

**Testimony to the Subcommittee for Indigenous Peoples of the United States,  
Committee on Natural Resources, U.S. House of Representatives**

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**Regarding the Discussion Draft of the RESPECT Act  
May 20, 2021**

Guw'aadzi, hello.

Thank you to the Subcommittee for Indigenous Peoples of the United States for the opportunity to comment on this proposed Requirements, Expectations, and Standard Procedures for Effective Consultations with Tribes, or “RESPECT” Act. My name is Lauren van Schilfgaarde. I serve as Director for the UCLA School of Law’s Tribal Legal Development Clinic and am also a tribal member of the Pueblo de Cochití. The Tribal Legal Development Clinic provides legal services to tribes and tribal organizations regarding the development and enhancement of tribal legal structures. Tribal self-determination continuously intersects with federal policies, necessitating informed communication, discussion, and negotiation. Yet, the process for federal-tribal consultation is, currently clunky.

The RESPECT Act, is a novel, comprehensive codification of the federal government’s obligation to meaningfully consult with tribal governments. This is critical, both symbolically and substantively.

The desire to strengthen federal-tribal relations through consultation has permeated federal policy for the last half century. Yet, consultation has largely been executed via inconsistent or non-existent agency protocols. There are instances in which federal agencies:

- Have no consultation policy whatsoever.
- Have wildly inconsistent policies and/or practices.
- Fail to follow their consultation policies, with no accountability measures.
- Treat consultation as merely checkbox procedural requirements regardless of actual tribal engagement.
- Perceive consultation as a one-sided event, in which the federal agency solely develops the agenda, limits engagement to one meeting, or restricts the flow of information.
- Treat consultation with one tribe as satisfying consultation with all tribes; or with tribal organizations or individual tribal members as satisfying consultation with a tribe.

Critically, because consultation has never been comprehensively codified, tribes have minimal statutory relief to compel federal agencies to engage in consultation, or to hold federal agencies accountable when those agencies have failed to engage meaningfully. The results have been disastrous for tribes, have resulted in reactionary and adversarial posturing, and have been immensely costly for tribes, the federal government, and the greater American polity.

Despite the lack of codified consultation requirements and expectations, consultation with tribal governments, when conducted meaningfully, has nevertheless proven to be the most effective and efficient means for acknowledging and braiding tribal concerns into the vast array of projects and interests in this country, including, but also beyond, environmental and cultural resource protection. Consultation is a manifestation of the nation-to-nation federal-tribal relationship. It facilitates large-scale resource management planning, incorporating tribal concerns early and thereby limiting costly and harmful intrusions later. It is an efficient and trusted mechanism for addressing unforeseen impacts. It is good federal and tribal governance.

Moreover, meaningful consultation has been identified internationally as a tool of good governance. The UN on the Rights of Indigenous Peoples calls for nation-States to consult and cooperate, in good faith with Tribal Governments in order to obtain their free, prior and informed consent, including before adopting and implementing legislative or administrative measures that may affect them.<sup>1</sup> Free, Prior and Informed Consent, or FPIC, is a information-gathering and decision-making framework we can and should use to guide our consultation protocols. This RESPECT Act incorporates many of these tenets in critical ways.

All federal agencies need a robust tribal consultation policy that:

- Necessitates tribal input regarding the development of agency management plans, especially regarding landscapes that include sacred places.
- Provides meaningful notice of potential impacts to tribal interests as early in the process as feasible.
- Provides ongoing communication regarding developments.
- Allows for a range of consultations in form, substance, and length depending on the needs and expressed desires of the tribe.
- Provides mechanisms for tribally initiated communications.
- Does not conflate distinct tribal nations or their interests.
- Consolidates consultation notices and format internally and across agencies to minimize the flood of notices and processes on tribal nations.
- Considers and protects the confidentiality of tribally sensitive information, including Traditional Knowledge.
- Institutionalizes a nation-to-nation relationship that seeks tribal input and consent.

Dawaa'e, Thank you.

### ***Prior Federal Consultation Guidance***

There are presently very few codified consultation requirements.<sup>2</sup> Two legislative examples of such institutionalized federal consultation protocols include the Section 106 process of the National Historic Preservation Act (NHPA)<sup>3</sup> and the Native American Graves Protection and

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<sup>1</sup> G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, Art. 19 (Sept. 13, 2007).

<sup>2</sup> An additional legislative example includes the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370.

<sup>3</sup> Section 106 of the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. § 470 et. seq.

Repatriation Act (NAGPRA).<sup>4</sup> Section 106 requires federal agencies to consider the effects of different projects they assist, fund, or approve on federal lands. If a federal or federally-assisted project has the potential to affect a historic property, Section 106 gives any interested parties, as well as the public and the Advisory Council on Historic Properties, the chance to weigh in.<sup>5</sup> Similarly, NAGPRA requires that federal agencies and federally-funded museums inventory and provide written summaries of Native American human remains and other cultural items in their possession. The agencies and museums must attempt to reach agreements with Tribes on the repatriation of these remains and sacred objects, as well as funerary or culturally significant ancestral property.<sup>6</sup>

These efforts, while important, only narrowly address consultation through patchwork implementation in specific areas. The need for consultation critically includes environmental regulation and cultural resource protection, but also extends to numerous other subject matters. Thus, the RESPECT Act's approach to compel all federal agencies to adopt a baseline consultation protocol is essential.

In 2000, President Clinton issued Executive Order 13175 instructing government agencies to “respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”<sup>7</sup> To do so, E.O. 13175 calls for agencies to implement processes “to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”<sup>8</sup> The Executive Order resulted in the creation of numerous internal policies committing to consultation and collaboration with Tribal governments.<sup>9</sup> E.O. 13175 has proven to be an important expression of federal policy towards the nation-to-nation relationship with tribes, as well as a substantive push for federal agencies to build out their consultation infrastructure.

Unfortunately, these consultation policies have remained—in part due to their patchwork nature—poorly coordinated and largely an afterthought.<sup>10</sup> Policies can vary, compelling tribes to master the idiosyncratic methods of different federal agencies for no substantive reason. Other federal agencies fail to have any substantive consultation policy, necessitating a reactive and frequently costly response to federal decisions that failed to engage tribes at the outset. This was

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<sup>4</sup> Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. 3001-13; *see also* US Senate Report 101-473.

<sup>5</sup> Further implementation of consultation protocols regarding Historic and Cultural Properties includes the National Register Bulletin 38, a set of Guidelines for Evaluating and Documenting Traditional Cultural Properties. These technical guidelines allow for Tribes to apply for inclusion in the National Register of Historic Places, and has been particularly important for Indian tribes and Native Hawaiians seeking to protect culturally sacred or important places. [National Register Bulletin 38](#), U.S. Department of the Interior National Park Service Interagency Resources Division, NPS.gov (1992).

<sup>6</sup> [Native American Graves Protection and Repatriation Act: Facilitating Respectful Return](#), NPS.gov

<sup>7</sup> Executive Order No. 13175, [Consultation and Coordination with Indian Tribal Governments](#), 65 Fed. Reg. 67,249 (Nov. 6, 2000).

<sup>8</sup> *Id.*

<sup>9</sup> Colette Routel & Jeffrey Holth, [Toward Genuine Tribal Consultation in the 21st Century](#), 46 U. MICH. J. L. REFORM 417, 444 n.152 (2013).

<sup>10</sup> *Id.* at 444-47 (detailing failure of the Department of the Interior to consult with Tribes regarding proposed reorganization divorcing the Office of Indian Education Programs from the Bureau of Indian Affairs).

most recently evidenced in the cancellation of plans to sell the Seattle branch of the National Archives due in part to the failure to consult with the impacted tribes.<sup>11</sup>

Following President Clinton's Executive Order there have been multiple commitments to continue implementing and bolstering tribal consultation policy. On November 5, 2009, President Obama signed a Presidential Memorandum, directing the head of each agency to develop a detailed plan of action to implement Clinton's Executive Order 13175. The Memorandum reiterated the push towards executive departments and agencies engaging in "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications."<sup>12</sup>

Shortly thereafter, at the White House Tribal Nations Conference on December 15, 2010, President Obama also announced that the United States would "lend its support" to the United Nations Declaration on the Rights of Indigenous Peoples.<sup>13</sup> Included in the Declaration is the process of Free, Prior, and Informed Consent (FPIC), principles which aim to establish effective and meaningful nation-to-nation consultation with Tribal governments.

Most recently, on January 26, 2021 President Biden signed a memorandum titled "Tribal Consultation and Strengthening Nation-to-Nation Relationships." This memorandum declares that "it is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy."<sup>14</sup>

The Presidential Memorandum, like President Obama's before it, goes on to convey its commitment to fulfilling the consultation requirements of Clinton's Executive Order 13175. President Biden directs "each agency" to submit "a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175" which are to "be developed after consultation by the agency with Tribal Nations and Tribal officials." All plans must be submitted to the Director of the Office of Management and Budget (OMB) within 90 days (April 26, 2021).<sup>15</sup> Agencies must also submit an annual progress report "on the status of each action included in the agency's plan."<sup>16</sup>

The memorandum serves as a valuable commitment to reaffirming the strength of Tribal consultation protocol in the United States. However, it does not provide concrete examples of what strong consultation looks like. Critically, neither E.O. 13175 nor the Presidential Memorandums provide a cause of action to compel federal agencies to comply with the tribal

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<sup>11</sup> Liz Ruskin, "[In a win for Alaska tribes, Biden admin nixes plan to sell National Archives building in Seattle.](#)" Alaska Public Media (Apr. 8, 2021).

<sup>12</sup> President Obama, [White House Memorandum For The Heads Of Executive Departments And Agencies on Tribal Consultation](#) (November 5, 2009).

<sup>13</sup> National Congress of American Indians, "[President Obama Announces U.S. Support for United Nations Declaration on the Rights of Indigenous Peoples.](#)" NCAI.org (Dec. 16, 2010).

<sup>14</sup> President Biden "[Tribal Consultation and Strengthening Nation-to-Nation Relationships](#)" (January 26, 2021).

<sup>15</sup> [NCAI Consultation Webpage](#), NCAI.org; *see also* President Biden "[Tribal Consultation and Strengthening Nation-to-Nation Relationships](#)"(January 26, 2021).

<sup>16</sup> President Biden "[Tribal Consultation and Strengthening Nation-to-Nation Relationships](#)"(January 26, 2021).

consultation protocol mandate, nor hold the substance of or compliance with those protocols accountable.

### ***Current Federal Agency Consultation Policies***

Existing federal policies tend to fall into two categories: (1) broad policy documents and (2) more substantive procedural documents. Both categories present an encouraging step towards meaningful consultation, however a robust consultation policy incorporating the FPIC principles should encompass both.

*Broad Policy Documents.* Broad policy documents tended to simply recite and affirm the Executive Orders of previous administrations. These policies pledge their agencies' support to the consultation program, but they do little to articulate concrete procedures or roles that the organization will adopt in furtherance of that policy.<sup>17</sup> Unfortunately, there are critical instances where these broad policies never materialize and moreover, courts have used these broad policies to show that there are no specific consultation requirements.<sup>18</sup> However, they do stress the importance of certain principles of tribal consultation, including tribal sovereignty and information.

Of note, these policies tended to include value statements regarding tribal sovereignty and the need for training. Noteworthy policies stressed their intent to give “due consideration to the right of sovereignty and self-governance of federally recognized Tribes.”<sup>19</sup> The Advisory Council for Historic Preservation, or ACHP, further pledged to be “guided by principles of respect for Indian tribes and their sovereign authority.”<sup>20</sup> Other noteworthy policies espouse a view towards transparency and training both internally within the organization as well as externally. Some goals included training staff members on the merits of consultation by providing them with information about the principles of tribal sovereignty and trust responsibility.<sup>21</sup> Other, external-facing goals for the ACHP included assisting Indian tribes in realizing their roles and rights under the Section 106 Review Process, including guidance material, workshops, and communication through direct mail and email.<sup>22</sup> The Department of Energy, or DOE, similarly certified that “[d]epartmental consultation will include the prompt exchange of information regarding identification, evaluation, and protection of cultural resources.”<sup>23</sup>

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<sup>17</sup> Advisory Council for Historic Preservation, [ACHP Policy Statement Regarding ACHP's Relationship with Indian Tribes](#) (2000); Bureau of Reclamation, [Indian Policy of the Bureau of Reclamation](#), (2014 with minor revisions in 2016, 2018); Department of Energy, [American Indian & Alaska Native Tribal Governance Policy](#), p. 2 (2009); and Department of Defense, [American Indian and Alaska Native Policy](#). See also American Indian Religious Freedom Act, 42 U.S.C. § 1996 (silent on how consultation is to occur); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (also silent on how consultation is to occur).

<sup>18</sup> See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 471 (1988) (Brennan, J., dissenting); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1096 (9th Cir. 2005).

<sup>19</sup> Bureau of Ocean Energy Management [BOEM Tribal Consultation Guidance](#), p. 4 (2018).

<sup>20</sup> Advisory Council for Historic Preservation, [ACHP Policy Statement Regarding ACHP's Relationship with Indian Tribes](#), 2 (2000).

<sup>21</sup> Id.; also see, e.g., Department of Energy, [A Guide for DOE Employees Working with Indian Tribal Nations](#) (2000) (detailing guidance for interactions with tribal governments and cultures).

<sup>22</sup> Advisory Council for Historic Preservation, [ACHP Policy Statement Regarding ACHP's Relationship with Indian Tribes](#) (2000).

<sup>23</sup> Department of Energy, [American Indian & Alaska Native Tribal Governance Policy](#), p. 4 (2009).

Most of the statements, however, tended to omit many of the details for how agencies planned to develop or empower their consultation policies to be more meaningful, electing instead to “establish mechanisms,”<sup>24</sup> “comply with current . . . laws,”<sup>25</sup> or form a program or committee that would then “develop and coordinate . . . policies.”<sup>26</sup> Further, the majority of policies refer to “projects and programs that affect Indian Tribes”<sup>27</sup> without any reference to what criteria will determine whether a project affects tribal sovereignty, who bears the burden of notice, or how the department is planning to build accountability into their departmental procedures.

Some agencies have instituted fully aspirational documents centered on the improvement of their current consultation framework. The Department of Interior, for example, has recently issued a document calling for tribes and leaders to assist with answering questions and crafting new definitions of consultation and consent.<sup>28</sup> Although these documents are not a reflection of a current consultation structure, they are an invaluable tool for introducing the pillars of FPIC to answer questions and new shape conversations about consultation and consent. More importantly, they provide a prominent space for tribal governments to voice the values of meaningful consultation that are most important to them.

Broad policy statements are a necessary first step in the road towards meaningful consultation and build a pressure to engage with the issue that is extremely valuable. These types of policies allow tribes to push for more specific requirements and build credibility with the agencies.

*Substantive Procedural Documents.* Substantive procedural documents tend to provide a more detailed framework containing many of the principles of meaningful consultation.<sup>29</sup> The Bureau of Land Management, or BLM, and their procedural policies surrounding communication provide a good example. The BLM committed to communicating with Tribal governments and created staff roles within the department designed to facilitate and carry out tribal consultation policy. They detail the responsibilities of these officers and liaisons in an appendix<sup>30</sup> and provided for their education or training for the purpose of consultation.<sup>31</sup> Along with new staff roles, the BLM also created the position of Departmental Tribal liaison, tasked with promoting and documenting communication, advising the department of possible impacts of proposed agency action, and assisting in the creation of solutions.<sup>32</sup> Further, to ensure that the new position of Tribal liaison had sufficient support within the organization, the BLM created a role for Project Managers, who work with liaisons to oversee documentation and ongoing dialogue as

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<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Advisory Council for Historic Preservation, [ACHP Policy Statement Regarding ACHP’s Relationship with Indian Tribes](#), 4 (2000).

<sup>27</sup> Id.

<sup>28</sup> Department of Interior, [Framing Paper: Improving Department of Interior’s Consultation with Tribes](#) (2021).

<sup>29</sup> See, e.g., Bureau of Land Management, [BLM Tribal Consultation Guidance](#) (2016); Bureau of Ocean Energy Management, [BOEM Tribal Consultation Guidance](#) (2018); Office of Natural Resources Revenue, [ONRR Tribal Consultation Policy](#), (2018); U.S. Environmental Protection Agency, [EPA Policy on Consultation and Coordination with Indian Tribes](#), (2011); Department of the Interior, Departmental Manual, Part 512: American Indian and Alaska Native Programs, [Chapter 5: Procedures for Consultation with Indian Tribes](#).

<sup>30</sup> Bureau of Land Management. [BLM Tribal Consultation Guidance](#), MS-1780 – Tribal Relations, 11 (2016).

<sup>31</sup> Id.; Bureau of Ocean Energy Management, [BOEM Tribal Consultation Guidance](#) (2018).

<sup>32</sup> Bureau of Land Management. [BLM Tribal Consultation Guidance](#), MS-1780 – Tribal Relations, 11 (2016).

well as document the process and provide explanations of final decisions rendered.<sup>33</sup> This robust definition of roles extended to Tribes as well through the recognition of the different ways Tribal entities may arise. The consultation policy lists many possible Tribe to State relationships, not just Tribal governments of Federally recognized tribes but pathways for dealing with individuals, non-governmental tribal groups, or unrecognized communities.<sup>34</sup>

The Bureau of Ocean and Energy Management, or BOEM, places the burden of notice on themselves, and envisaged a structure of giving notice to a tribal liaison officer who would then determine whether the action or program has tribal implications as well as providing invitations or public notice of consultation.<sup>35</sup> The BLM and Department of Energy, or DOE, took the opposite approach, placing the burden of notice on the Tribe, but assisting in informing Tribal leaders by listing potential areas where tribal implications may arise<sup>36</sup> and being proactive with communication.<sup>37</sup> Many agencies included a documentation requirement of efforts made during the process, including attempts to contact tribes and notes of meetings.<sup>38</sup> Many documentation policies also included a requirement that participating Tribes be notified of the basis for the department's decision after the consultation process has finished, *including* a clear explanation of how tribal input affected the final decision.<sup>39</sup>

Policies that are more concrete with thought-out procedural frameworks help institutionalize the pillars of consultation necessary to interact more meaningfully with tribal governments. Yet, for truly meaningful consultation, a space must be provided for tribal input and expectations. Federal consultation policies must be institutionalized, while also flexible to the needs of tribes both regarding the proposed impact and the ability to consult.

### ***Free, Prior, and Informed Consent Should Be Our Framework***

Free, Prior and Informed Consent, or FPIC, is a framework for the federal government to engage with tribes in a way that maintains and respects tribal self-determination and sovereignty. FPIC is rooted in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples.<sup>40</sup> It is an information-gathering and decision-making framework that can help bolster the traditional

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<sup>33</sup> Office of Natural Resources Revenue. [ONRR Tribal Consultation Policy](#), 7-8 (2018).

<sup>34</sup> Bureau of Land Management. [BLM Tribal Consultation Guidance](#), MS-1780 – Tribal Relations, 20-21 (2016); U.S. Fish and Wildlife Service [U.S. Fish & Wildlife Service Tribal Consultation Handbook](#), 12 (2011, updated 2018).

<sup>35</sup> Bureau of Ocean Energy Management, [BOEM Tribal Consultation Guidance](#) (2018).

<sup>36</sup> Bureau of Land Management. [BLM Tribal Consultation Guidance](#), MS-1780 – Tribal Relations, 22-25 (2016); *see also* Department of Education, [Tribal Consultation Policy](#), 3 (placing notice burden on themselves and allowing for Tribal requests for review).

<sup>37</sup> Department of Energy, [American Indian & Alaska Native Tribal Governance Policy](#), 2 (2009).

<sup>38</sup> Bureau of Ocean Energy Management, [BOEM Tribal Consultation Guidance](#), 9 (2018).

<sup>39</sup> Bureau of Land Management. [BLM Tribal Consultation Guidance](#), MS-1780 – Tribal Relations, 18 (2016); Bureau of Ocean Energy Management, [BOEM Tribal Consultation Guidance](#), 9 (2018); Department of the Interior, Departmental Manual, Part 512: American Indian and Alaska Native Programs. [Chapter 5: Procedures for Consultation with Indian Tribes](#), p. 3 (summary reports).

<sup>40</sup> G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

understanding of consultation from perceiving tribes as obstacles to sovereign partners. Notably, Article 19 of the Declaration calls on States, including the United States,<sup>41</sup> to

[C]onsult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Because FPIC promotes the partnership aspect of consultation, it is an ideal framework for transforming consultation policy from a list of checkboxes to a genuine interaction between nations. FPIC goes further than the current U.S. domestic consultation regime and recognizes that tribal stakeholders have the right to influence and consent to any potential project or piece of legislation that implicates their interests.

*Notice.* Consultation policies should state how and when tribes should expect notice and when State actors expect to give it. Consider the Consultation Procedure of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians Tribal Code Section 1-8-6:

The federal agency contacts the Tribal Council or its appointed point-of-contact to notify the Tribes of an impending project proposal or to conduct an activity that may or may not affect a tribal resource . . . The Tribal Council responds to the agency that the issue is important and that it would like to initiate consultation.<sup>42</sup>

Alternatively, in instances in which tribes need to notify federal agencies about an action, there should be a mechanism for providing such communication and requests for consultation. California's Environmental Quality Act showcases this form of notice-giving in AB-52 and SB-18:

Within 14 days of determining that an application for a project is complete or a decision by a public agency to undertake a project, the lead agency shall provide formal notification to the designated contact of, or a tribal representative of, traditionally and culturally affiliated California Native American *tribes that have requested notice*.<sup>43</sup>

[I]f land designated, or proposed to be designated as open space, contains a place, feature, or object described in Sections 5097.9 and 5097.995 of the Public Resources Code, the city or county in which the place, feature, or object is located shall conduct consultations with the California Native American tribe, if any, *that has given notice*.<sup>44</sup>

Notice provides tribes with the opportunity to engage in other aspects of consultation, including communication to determine how their tribe will be affected and the opportunity to be involved in the decision-making process. While tribes may be limited by the agencies' timing and

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<sup>41</sup> See The White House Office of Press Secretary, "[Remarks by the President at the White House Tribal Nations Conference](#)" (Dec. 16, 2010); United States State Department, "[Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship and Improve the Lives of Indigenous Peoples](#)," (Jan. 12, 2011).

<sup>42</sup> Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians Tribal Code Section 1-8-6 [Consultation Procedure](#).

<sup>43</sup> AB-52 Native Americans: [California Environmental Quality Act](#) (2013-2014) (emphasis added).

<sup>44</sup> CA SB-18 [Traditional tribal cultural places](#) (2003-2004) (emphasis added).



communication, tribal codes can express expectations that consultation should happen early and often in the process. A robust consultation process would likely include both pieces of notice—allowing a tribe to request to be notified about certain resources while also placing a burden on the acting agency or State government to alert nearby tribes as to the initiation of projects—so that both parties have the opportunity to be as prepared as possible for consultation, prior to when the opportunity arises.

*Communication.* Early communication allows for all parties to have access to necessary details early in the process which is key to keeping tribes informed. Laying out the importance of communication, as well as the expectation of personal and constant communication between governments can facilitate a more meaningful discussion between sovereigns, as well as make the process of consultation more efficient.

*Information.* The exchange of meaningful information requires the taking of specific, concrete steps to inform both federal and tribal actors as to the issues at play. In some consultation provisions, tribes provide for the meeting of technical staff, or the creation of a technical subcommittee to advise on the effects of the proposed activity.<sup>45</sup> At the heart of the information consideration is the desire for both parties to completely understand the activity and/or resources at stake to better understand where the consultation discussion can be most beneficial. More information helps ensure complete comprehension of the plan or activity, which allows tribes to operate fully informed of the possible effects (either positive or adverse) before making their decision and/or recommendation. To make the best decision possible, tribes can request consultation regarding multiple issues, including alternatives to the project. Again, these provisions emphasize the importance of providing information early and often in the process, to allow both parties to have the most informed—and as a result, meaningful—discussion possible.

*Transparency.* Some consultation provisions emphasize transparency throughout the process. Sometimes this manifests itself in the form of increased/widely available information and documentation, other provisions refer to meetings, forums, conferences, and hearings open to tribal councils or members of attendance.<sup>46</sup> Documentation includes increasing the information and reports distributed to the tribe, either by posting information on a website or otherwise making it widely accessible.<sup>47</sup> Transparency can include the utilization of public meetings. Meetings provide opportunities for the involvement of citizens, public agencies, public utility companies, and civic, education, and other community groups through public hearings and any other means deemed appropriate.<sup>48</sup> Transparency is also important for building trust and guiding a fruitful discussion, but perhaps more importantly, increased documentation and hearings also provide a method of review and guidance for future participants.

*Bilateral Decision-making.* Bilateral decision-making is a key consideration for realizing consent. The “consent” of FPIC does not necessarily equate to a tribal veto. Rather, it speaks to decision-making process, namely *including* tribal considerations. Creating a space for tribal

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<sup>45</sup> See, e.g., Suquamish Tribe, [Memorandum of Understanding Between the Suquamish Tribe and the City of Poulsbo Guiding Principles](#), mrrsc.org (providing for the creation of a technical subcommittee as needed).

<sup>46</sup> See, e.g., USDA Departmental Regulation 1350-002: [Tribal Consultation, Coordination, and Collaboration](#)

<sup>47</sup> Id.

<sup>48</sup> See, e.g., Id. and SB-18 [Traditional tribal cultural places](#) (2003-2004).

consultation—and the process that comprises it—to have real teeth, and thus consequences when it is not conducted adequately, pushes consultation as a whole to be more in line with the truly consensual FPIC process.

### *Specific Notes on the RESPECT Act*

Notably, the proposed RESPECT Act includes a detailed notification procedure.

Ideally, “government-to-government” should be replaced with “nation-to-nation”. This framing underscores tribal sovereignty and resists conflating tribal governments with municipal or other subsidiary governments.

Ideally, the Act should distinguish between the creation/modification of management plans, notice for pending federal actions, and tribal requests to ensure regulatory compliance of federal actions.

Confidentiality should be built into the consultation process. Such as adding the following language in Sec. 201(3):

(3) publish the completed Tribal Impact Statement in the Federal Register before any further action on the proposed activity or regulatory action, except to the extent tribally sensitive information should be kept confidential, including at the request of a Tribal Government.

Under Sec. 202(c), “a consultation meeting” should be expanded to “consultation”. Consultation can be just one meeting, but can also be several meetings, ongoing written correspondence, etc.

The Tribal Leader Taskforce appears to be an efficient method for achieving a holistic yet inclusive consultation process. Yet, this legislation should ensure it does not replace notice and engagement with Tribal Governments that seek to engage outside of a Tribal Leader Taskforce format.

Under Sec. 202(e), the requirement that consultation conclude only upon the execution of a memorandum of agreement is an excellent vehicle for ensuring that tribes remain at the process and decision-making table. The requirement for a good faith effort provides a meaningful accountability mechanism, fulfilling the “consent” of FPIC.

Under Sec. 203(b), recommend extending the notice requirement beyond the Federal Register to include direct communication with identified impacted tribes.

Sec. 301 provides substantive transparency protection through documentation. However, recommend including confidentiality protections for tribally sensitive information. This is noted in Sec. 502, but may warrant a cross-reference.

Sec. 403 provides excellent training requirements.

Sec. 501 provides a notable grant of discretion to Tribal Governments, and encouragement for the enhancement of tribal capacity and law-making.

Sec. 502 provides an excellent protection of confidentiality for tribally-sensitive information.

Sec. 601 is arguably the most critically component, providing judicial relief where none has previously existed.